Supreme Court, U. S.
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No. 79-1671

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

ROY WARNER, et al.

Petitioners

vs.

SOVEREIGN NEWS COMPANY

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

BERNARD A. BERKMAN
LARRY S. GORDON
BERKMAN, GORDON, LEVY, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Respondent,
Sovereign News Company

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit, without deciding the merits of the consolidated appeals of petitioner, respondent and a third party in the original action, erred in remanding the case to the District Court for further consideration in light of an intervening state court decision bearing on the issue determined by the District Court.

STATEMENT OF THE CASE

Respondent, Sovereign News Co., commenced this case by complaint it filed on March 7, 1977, in the United States District Court for the Northern District of Ohio against Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio, two Dayton, Ohio, police officers, John T. Corrigan, Prosecuting Attorney for Cuyahoga County,

and twenty-six individually named City of Cleveland, Ohio, police officers. The complaint sought, inter alia, injunctive relief, preliminary and permanent, against defendants' use of certain materials alleged to have been unlawfully seized from respondent's premises, and a declaratory judgment that the Ohio obscenity and pandering obscenity statues, Ohio Revised Code Sections 2907.01 and 2907.32, were, as applied and on their face, violative of the First and Fourteenth Amendments to the United States Constitution.

On October 31, 1977, the District Court, after an evidentiary hearing, entered its judgment order (Appendix, pp. 1a-4a), in which it determined that it was required to abstain from entertaining jurisdiction of the claims for preliminary injunction and declaratory judgment against the prosecuting attorney for Montgomery County, Ohio, and the two police officers of the

City of Dayton. The District Court also determined that abstention was not required with respect to the same claims for relief asserted against the Prosecuting Attorney for Cuyahoga County, Ohio, and the petitioners herein, the police officers of the City of Cleveland. Upon consideration of the merits of the claims, the District Court found that the record warranted the issuance of the requested preliminary injunctive relief, and that the Ohio obscenity and pandering obscenity statutes, §§2907.32 and 2907.01(F), were impermissibly vague, overbroad, and not subject to a narrowing construction by a state court, and therefore declared them to be in violation of the First Amendment to the Constitution. The Cuyahoga County Prosecutor and petitioners were enjoined from enforcing these statutes against respondent. (Appendix, pp. 1a-4a).

Three separate appeals from the District Court's order were perfected to the Court of Appeals, to-wit: Respondent appealed from the District Court's abstention on the claims against the Montgomery County Prosecutor and the Dayton police officers, the Cuyahoga County Prosecutor and petitioners appealed from the preliminary injunction entered against them and the decision on the declaratory judgment. These appeals were consolidated in the Court of Appeals.

On December 7, 1978, after briefs had been filed in the Court of Appeals, but prior to argument and decision of the consolidated appeals, the Supreme Court of Ohio announced its decision on Ohio v. Burgun, 56 Ohio St. 2d 354, 384 N.E. 2d 255 (1978), in which it held that the same Ohio obscenity and pandering obscenity statutes which the District Court determined violated the First Amendment, were constitutionally sufficient when authoritatively

construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15 (1973).

On December 7, 1979, the Court of Appeals, without deciding the merits of any of the issues in the consolidated appeals before it, remanded the case to the District Court "for further consideration in the light of the decision of the Supreme Court of Ohio in State of Ohio v. Burgun." (Petition, Appendix A; 610 F.2d 428). Petitioners' motions for rehearing and rehearing en banc were denied (Ibid.).

REASONS FOR DENYING THE WRIT

Petitioners contend that the Court of Appeals abused its discretion in ordering the remand and seek certiorari review by this Court not only of the Court of Appeals' order of remand, but a determination of the merits of all the issues presented by petitioners in their appeal. (See Questions

Presented, Petition, p. 4). In a sense, therefore, petitioners seek certiorari review under Supreme Court Rule 20 of a case pending in the Court of Appeals before judgment. However, such review of a case in the Court of Appeals, by the express language of Rule 20 itself, is limited to those matters in which there is a "showing that the case is of such imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement in this court." No such showing has been made; nor could it be inasmuch as the District Court's order is operative only in Cuyahoga County, Ohio.

The Court of Appeals has not reviewed the merits of the issues presented by any of the three appellants in the consolidated appeal presented to it. This fact distinguishes this case from Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964), Reece v.

Georgia, 350 U.S. 85 (1955), Mercer v. Theiot, 377 U.S. 152 (1964), and New Orleans v. Dukes, 427 U.S. 297 (1976), which are cited by petitioners as examples of cases in which certiorari has been granted to review questions which were not directly presented for review. However, in each of the cited cases, all the issues considered by this Court had at one time or another been reviewed by and received appellate adjudication by the respective appellate courts. The questions which petitioners present to this Court have never been determined by the Court of Appeals. This Court will not ordinarily consider issues which have not been considered by the Court of Appeals. Adickes v. S. H. Kress & Co., 398 U.S. 144, 147, fn. 2 (1970), Duignan v. United States, 274 U.S. 195, 200 (1927).

The procedure employed by the Court of Appeals in remanding the case to the district court for further consideration in

light of the intervening decision of the Ohio Supreme Court in State v. Burgun, supra, is wholly consistent with the practice of this Court to withhold review and remand for further consideration when events occur in the interim between the lower court's decision and consideration of the case on appeal. Sanks v. Georgia, 401 U.S. 144, 151-153 (1971) (Georgia statute amended pending appeal). This Court has likewise refrained from reviewing issues presented to but not passed on by the Court of Appeals, and has remanded the case to the appellate court for decision of the unresolved issues. Pinkus v. United States, 436 U.S. 293, 304-305 (1978). Inasmuch as the procedure followed by the Court of Appeals in remanding the case conformed with generally accepted and well-established practice, there is no compelling reason for this Court's certiorari review of such action. Nor are there any other

special or important reasons for granting certiorari within those reasons set out in Sup. Ct. Rule 19 which are deemed favorable considerations for allowance of the writ.

CONCLUSION

The District Court's decision was accompanied by an opinion of more than one hundred printed pages in which the facts and applicable law, later challenged in the appeal, were carefully examined and analyzed by the court. The Court of Appeals, in furtherance of a sound judicial policy which discourages and disapproves of appellate review of questions which are undecided by the lower tribunal, remanded the case to the District Court to reconsider its decision in light of the subsequently announced state court decision.

In addition to the considerations of common courtesy, proper appellate procedure dictated that the trial court should be afforded an opportunity to review and

determine for itself whether the judgment it entered was in any way affected by the intervening decision and, if so, to modify the same, before the judgment was subjected to review on appeal.

Petitioners' request for certiorari review of not only the Court of Appeals' order of remand, but also the issues presented to that court in the appeal, merely compounds petitioners' attempt to subvert the District Court's opportunity to adjudge this case in light of the intervening decision. Were the petition allowed as prayed for, this Court would effectively be required to render a decision on issues not previously addressed by either the District Court or the Court of Appeals. The case would be thus transformed into one in which the original jurisdiction of this Court was invoked. Such an anomolous result is not intended by the Constitution, or the statutes and rules governing the

jurisdiction and procedure in this Court.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

BERNARD A. BERKMAN
LARRY S. GORDON
BERKMAN, GORDON, LEVY,
MURRAY and PALDA

Attorneys for Respondent,
Sovereign News Co.

May, 1980

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

SOVEREIGN NEWS CO. 2075 East 65th Street Cleveland, Ohio,	)	CASE NO. C77-230
Plaintiff,	)	[Filed October 31, 1977]
v.	)	
LEE C. FALKE Prosecuting Attorney for Montgomery County, Ohio 41 N. Perry Street Dayton, Ohio	)	
and	)	Judge John M. Manos
E. R. ROBINSON and C. L. DALRYMPLE c/o Department of Police City of Dayton	)	
and	)	
JOHN T. CORRIGAN Prosecuting Attorney for Cuyahoga County, Ohio Justice Center 1200 Ontario Street Cleveland, Ohio	)	JUDGMENT ORDER
and	)	

ROY WARNER, L. THOMPSON, JOHN CRAWFORD, ARCHIE CATAVOLOS, KENNETH WHITE, WILLIAM POE, RICHARD B. MILLET, JOHN H. DEVINE, JAMES LYNSKY, VINCENT G. KRAWULSKI, CARL DELAU, ANDREW S. VANYO, JAMES KENNELLEY, ROBERT J. CERMAK, HENRY YISHA, GREGORY KUNZ, B. JONES, RICHARD McINTOSH, JOHN McNAMARA, EDWARD C. LOUCAS, SAMUEL HENNIE, CHARLES BERKEY, ROBERT O'BRIEN
c/o Department of Police
City of Cleveland

and

the following members of the Police Department of the City of Cleveland, Ohio, whose full names are unknown at this time: KAMINSKI, BANYON, McGREER (Badge No. 1583), and JOHN DOE I, JOHN DOE II, and JOHN DOE III,

Defendants.

Based on the Memorandum of Opinion filed in this case today, which Memorandum of Opinion is fully integrated in this Judgment Order, the court orders that:

(1) It will abstain, under the doctrine of Younger v. Harris, from deciding Sovereign's declaratory judgment and preliminary injunction claims against the Montgomery County defendants, Lee Falke, E. R. Robinson, and C. L. Dalrymple, and therefore, the court dismisses those claims against those defendants;

(2) The court will not abstain from deciding Sovereign's declaratory judgment and preliminary injunction claims against the Cleveland police officer defendants and Cuyahoga County Prosecutor John T. Corrigan under either the Younger v. Harris or the Pullman abstention doctrines;

(3) For the reasons stated in the court's Memorandum of Opinion, the court issues a declaratory judgment for Sovereign, and against the Cleveland police officer defendants and John T. Corrigan, holding Ohio's pandering obscenity statutes, Ohio Revised Code §§2907.32 and 2907.01(F), unconstitutional because those statutes

violate the First Amendment to the United States Constitution;

(4) For the reasons stated in the Memorandum of Opinion, the court issues a preliminary injunction against the Cleveland police officer defendants and John T. Corrigan restraining those defendants from enforcing Ohio Revised Code §§2907.32 and 2907.01(F), either alone, or in conjunction with other statutes, against the Sovereign News Company, Sovereign's owners, or Sovereign's employees;

(5) The court retains jurisdiction over all other claims in Sovereign's complaint, including the damage and permanent injunction claims against all defendants.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge